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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

No. 176

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW, GIN SANG GET and GIN SANG MO,
(On Habeas Corpus),
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANTS.

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Statement of the Case.

These four appellants are persons of the Chinese race who have been ordered deported out of the United States to China by the *executive* deportation procedure of the General Immigration Law for a claimed violation of the Chinese Exclusion Laws

which provide only for a *judicial* deportation hearing. There was much diversity in the holdings of the different District and Circuit Courts of Appeals upon this point, but the matter was finally determined by this honorable court in the case U. S. v. Woo Jan, 245 U. S. 552; 38 Sup. Ct. Rep. 207; that such deportations could only be brought about after a *judicial* hearing. The appellee seeks to distinguish these cases from the Woo Jan case in this particular, that the General Immigration Act here in question is the Act of Feb. 5th, 1917, which, the Government contends, so amended the earlier General Immigration Law, as to thereafter permit of the use of the *executive* deportation procedure for violations of the Chinese Exclusion Laws. That the law is amended is true, but to what extent, is the question here involved. Appellants point out, however, that this last enacted General Immigration Law only became effective on May 1st, 1917, and that they had all arrived in the United States prior thereto, all as shown by the warrants of deportation against them, and more particularly as follows:

Ng Fung Ho, at San Francisco, by ss. Manchuria, July 20, 1915;

Ng Yuen Shew, at San Francisco, by ss. Manchuria, July 20, 1915;

Gin Sang Get, at San Francisco, by ss. China, July 24, 1916; and

Gin Sang Mo., at San Francisco, by ss. Shinyo Maru, April 28, 1917,

and they have therefore called attention to and claimed the protection of Section 38 of the last mentioned act, which, they claim, holds in force the prior existing laws, that is to say, the laws as they were in force immediately prior to the 1st day of May, 1917, which places them squarely within the ruling of the Supreme Court in the Woo Jan case. This, briefly stated, is the dominant point in these cases, and as it was equally applicable to each of the four, they joined in a common petition in their own names, to be relieved of the illegal restraint. The fifth appellant below, Lui Yee Lau, otherwise known as Louie Pou, was discharged by the appellate court, and so his rights are not involved herein.

An examination of the warrants of deportation discloses that Ng Fung Ho and Ng Yuen Shew were not otherwise ordered deported. Not so, however, as to the brothers Gin Sang Get and Gin Sang Mo. They are also ordered deported for what is claimed to be a specific violation of the General Immigration Law, in that they had entered without inspection. This is a suitable ground for deportation under the General Immigration Law, provided there is any evidence to support the charge. The appellants claim that it is a make-weight charge, entirely unsupported by any evidence, and it has only been made by the Secretary by misconstruing the statute. The facts are as follows:

Gin Sang Get and Gin Sang Mo are additionally charged with having entered without inspection by means of false and misleading statements. How-

ever this may be, the *statutory* charge is that the alien entered without inspection. To this the Secretary has added the qualification, *by means of false and misleading statements.* It is admitted that these two young men were applicants for admission at a regularly designated port of entry, they arrived by steamer, they were taken to the Immigration Station, they were held pending the taking of much testimony and the conducting of a very long and painstaking examination into the claims of their right of admission, and as a result thereof they were regularly admitted into the United States upon order of the Commissioner of Immigration for this Port. They have consistently contended and maintained that the order so made was proper and that they were entitled as of right to admittance to and residence within the United States as citizens thereof, they being the foreign born sons of a native born citizen of the United States.

The petition for the writ sets forth the above facts and has attached thereto copies of the different warrants of deportation. A demurrer was interposed and the immigration records in each of the cases were admitted in evidence by mutual consent. Judge Dooling, then presiding in the lower court, overruled the demurrer and thereupon a return was filed, which set up no new matter. The case was finally submitted to Judge Rudkin, then presiding in the lower court, and his judgment was adverse to the petitioners and they accordingly perfected an

appeal. The petitioners were admitted to bail by the lower court when the petition was first presented and have since so been at liberty.

Argument.

The ten assignments of error made in this matter may be somewhat reduced by consolidating different of the points. The predominant point is common to the rights of each of the four petitioners and will be treated *first;* that is whether a person may be deported as an alien Chinese here in violation of the Chinese Exclusion Laws, by resorting only to the *executive* process contained in the last General Immigration Law, when such person had entered this country prior to the taking effect thereof; if this point is decided as contended for by appellants, there would then remain only the so-called makeweight alleged violation of the General Immigration Act itself made against two of the petitioners; therefore the *second* point is whether the statutory charge of entry without inspection made against Gin Sang Get and Gin Sang Mo is sufficiently supported by evidence, and whether that ground of deportation may be supplemented by the charge "by means of false and misleading statements", and if so, whether it is sufficiently supported by evidence. Should these points be decided adversely to petitioners there would then remain the question as to whether the respective hear-

ings accorded by the Immigration authorities were fairly conducted and their conclusions sufficiently sustained by the evidence taken therein. This final point, as it affects Gin Sang Get and Gin Sang Mo, may for brevity's sake be treated in the *second* point, thus leaving as the concluding point, the *third,* as affecting Ng Fung Ho and his son, Ng Yuen Shew, whether the hearing accorded them was fair and whether the conclusion reached was sufficiently sustained by the evidence presented.

FIRST.

The appellee claims that these four petitioners are alien Chinese persons here in violation of the Chinese Exclusion Laws, all as more particularly set forth in the various *executive* warrants of deportation. It is shown from an inspection of the *executive* warrants of deportation, that in each instance the person proceeded against had arrived at the United States prior to May 1st, 1917, which was the date the General Immigration Law of Feb. 5th, 1917, became effective, and was not proceeded against until some considerable time thereafter. Appellants contend that there was no violation of the Chinese Exclusion Laws, but that if there was, such violation must have occurred at the time of the arrival of each appellant at the United States, and such violation was therefore an "act, thing or matter" "done or existing at the time of the taking

effect" of the General Immigration Law, and could only be dealt with under the prior existing laws, which were specifically "continued in force and effect" in their original form for such purpose, which necessitated a *judicial* instead of an *executive* deportation proceeding.

The Act of Feb. 5th, 1917, concludes with Sec. 38, which is in part as follows:

> "Sec. 38. That this act, except as otherwise provided in section three, shall take effect and be enforced on and after May first, nineteen hundred and seventeen. * * *
>
> *Provided,* That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen hereof, * * *
>
> *Provided further,* That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceeding brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

As for the Chinese Exclusion Acts, it is only necessary to generally call attention to the fact that *exclusive jurisdiction to deport* Chinese persons or persons of Chinese descent is conferred upon the *judicial branch* of the government. Act of May 6, 1882, as amended by the Act of July 5, 1884, Sec-

tion 12 (22 Stat. L., 58; 23 Stat. L., 115); Act of Sept. 13, 1888, Section 13 (25 Stat. L., 476, 477); Act of May 5, 1892, Section 2, Section 3, Section 6 (27 Stat. L., 25); Act of Nov. 3, 1893, Section 6 (28 Stat. L., 7); Act of Mar. 3, 1901, Sections 1, 2, 3 (31 Stat. L., 1093); Act of April 29, 1902 (32 Stat. L., part 1, 176); Act of April 27, 1904 (33 Stat. L., 394-428). The exclusive character of this judicial deportation procedure has been upheld by the Supreme Court in the Woo Jan case mentioned in the statement of this case and need not be further referred to. This present act as affecting the Chinese Exclusion Laws, amends its predecessor by the addition of the phrase "*except as provided in section nineteen hereof*". Section 19 of the Act of Feb. 5th, 1917, designates the different classes of aliens whose presence shall be deemed objectionable and provides for the *executive* deportation procedure by the Secretary of Labor. The purpose of this amendment of the Chinese Exclusion Laws was unquestionably to at least invest concurrent if not exclusive jurisdiction upon the Secretary of Labor to exercise his *executive* deportation prerogative, and places a five year limitation after entry within which the deportation must be effected, whereas formerly there was no such limitation. The question here presented is whether this newly created power of the Secretary can have any *retroactive* effect to cover prior alleged violations of the Chinese Exclusion Laws, in view of the sweeping saving clause which concludes the act, and which ends as

follows: "*but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect*".

It will be noted that this saving clause is most sweeping, embracing matters both criminal and civil, and also whether in action or not, but the possible subject of future action, at the time of the taking effect of the act, to-wit, May 1st, 1917. To this saving clause there is one exception placed on the middle: "*except as mentioned in the third proviso of section nineteen hereof*". This third proviso is as follows:

> "*Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States:"

It is at once observed that this sole exception to the saving clause contained in Section 38 has *plural* exceptions to its own scope of action. What are these exceptions? They must be first ascertained so that they may be withdrawn, for only in that way may be known the extent of the limitation on the saving clause contained in Section 38. An analysis of Section 19 discloses that it enumerates the various classes of aliens whose faults or misfortunes, as the case may be, renders their future residence in this country objectionable, and according to the gravity thereof sets the time within which they may be deported, and it finally places them in three

groups: the first of which we will call the *mild* offenders, may be deported within *three years after entry,* the second of which we will call the medium offenders, may be deported within *five years after entry,* while as to those remaining and who constitute the third group, which we will call the extreme offenders, they may be deported *at any time after entry.* We therefore contend that the "*exceptions hereinbefore noted*" must of necessity be the three and the five year groups, the mild and medium offenders, which form the exceptions referred to in the third proviso of Section 19. This solution is not only reasonable and consistent, but is entirely in keeping with the grading of the offenders according to the gravity of their offending. Accordingly we observe from Section 19 that those who enter in "violation of any other law of the United States", which undoubtedly refers to the former immigration acts held in force by the saving clause hereinafter adverted to (see Ex parte Durrand, 160 Fed. 558), and may or may not be intended to include the Chinese Exclusion Laws, may be deported "at any time within five years after entry", and are therefore without the third proviso of Section 19, and hence are not affected by the withdrawing proviso contained in the saving clause in Section 38. In other words, as to the mild and medium offenders against the General Immigration Law, or the other laws of the United States brought thereunder, the prior existing laws were held in force as to such "prosecutions, suits, actions, proceedings, acts,

things, or matters". As to the third group, that is to say, the extreme offenders, they are withdrawn from the protection of the saving clause in Section 38, and may be deported "irrespective of the time of their entry into the United States". Adopting this view of the matter, these appellants having been charged by the Secretary of Labor with having entered the United States in violation of the Chinese Exclusion Law, such offense, if committed at all, was complete and was "an act, thing or matter" "done or existing at the time of the taking effect" of the last General Immigration Law, May 1st, 1917, and they could accordingly only be prosecuted therefor under the prior existing laws which were continued in force for such purpose. Woo Jan v. U. S., supra, which necessitates a judicial proceeding. Whether the Secretary has even yet any jurisdiction over Chinese charged with a violation of the Chinese Exclusion Acts may well be questioned.

The exact point here raised was before the Circuit Court of Appeals for the Fifth Circuit in the case of Mayo, Immigration Com'r, v. United States, 251 Fed. 275. It is disclosed by the transcript of the record in that particular case that there, as originally here, there were five Chinese persons arrested upon the Secretary's executive warrants. The trial court discharged them from custody. The government appealed all of the cases and stipulated that the four remaining cases might follow the decision to be

rendered in the first case which is the one mentioned above. The court there held as follows:

> "It is difficult to determine just what is meant by the third provision of section 19; the exception to the last proviso of section 38 is not more clear. To give to the latter the meaning suggested by the government would be to permit the exception to substantially (if not absolutely) destroy the proviso. It may be possible to ascribe a meaning to each clause which would give effect to both. If the third proviso of section 19 be held to make that section applicable to all aliens, without reference to the time of their entry, who do, after the passage of the act, something denounced by the act, and if the last proviso of section 38 be held to preserve the status existing at the time of the passage of the act as to all aliens who commit no new offense thereafter, consistency and effect would be given to all the language under consideration. Under this view the 'things and matters' 'as they existed' with relation to the relator 'at the time of the taking effect of the act'—that is, his status as an alien in the country in violation of the Chinese Exclusion Law—will be dealt with by the law as it was before the passage of the act."

There is but one point in the case at bar in which it differs from the case just cited. The right of the alien (Lee Wong Hin) in the Mayo case to reside in the United States was *in action* at the time of the taking effect of the General Immigration Law, whereas with respect to these appellants, if they had violated the Chinese Exclusion Law in their entry or re-entry into the United States, such violation was then and there an "act, thing or matter, civil or criminal, done or existing at the time of the

taking effect" of the last General Immigration Law, though *not then in action*. This difference, however, does not affect the legal status of the case, this for the reason that the saving clause in Section 38 is unusual, by reason of including acts, things and matters not in suit or action; but we submit, the very fact that such acts, things and matters are specifically named shows an unmistakable intent upon the part of Congress to save the prior acts as to them, as well as to the acts, things and matters on suit or action.

Ex parte Durand, 160 Fed. 558, supra.

It is felt that there would have been more certainty in the expression of the opinion of the court in Mayo v. U. S., supra, had the industry of counsel directed the attention of the court to prior legislation and the judicial construction thereof. Thus the prior Immigration Act, that of Feb. 20th, 1907, contains in Section 28 almost exactly the same saving clause. This act is construed in Botis v. Davis, 173 Fed. 996, and it is there held on page 999 as follows (after setting forth Section 28):

> "The Act of 1907, therefore, is wholly prospective in its operation. The language used in the quoted section could hardly be made more comprehensive or explicit. All acts, things, and matters done or existing when the statute took effect are governed by earlier laws. The date of taking effect was July 1st, 1907, several months after Botis landed. So there can be no question that the Act of 1907 has no bearing or effect on Botis' status, which is governed entirely by pre-existing laws. * * *"

In viewing this same act, that of 1907, the Circuit Court of Appeals for the Seventh Circuit, in the case of Davies v. Manolis, 179 Fed. 818, clearly support this view, holding that the alien having entered the country in August, 1906, long prior to the enactment of the Act of Feb. 20th, 1907, he could not be deported thereunder. If he had violated a prior immigration act he must be specifically charged thereunder and given a hearing under the then existing law.

Pressing the research further, we find that the next earlier immigration act was that of March 3, 1903 (32 Stat. L., 1220), wherein Section 28, though differently worded, covered the same legislative intent as expressed in Section 28 of the Act of Feb. 20th, 1907, and Section 38 of the Act of Feb. 5th, 1917. This legislation was construed by the Circuit Court of Appeals for the Seventh Circuit, in the case of Lang v. U. S., 133 Fed. 201. The court there held:

> "* * * No prosecution could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was, that no prosecution begun under that statute, whether they were then pending or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word 'begun' is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought."

See also the concurring opinion of Jenkins, Circuit Judge.

It is further submitted that the legislative intent here manifested is reflected from earlier enactments, notably Rev. St., Section 13 (U. S. Comp. St. 1901, p. 6), enacted in 1871, and commented upon in Judge Jenkins' concurring opinion. It finds a more recent expression in Section 299 of the Judicial Code.

In the case of Russomanno, 128 Fed. 528, the Circuit Court, Lacombe, Circuit Judge, held:

> "The authority to deport this alien is to be found in the Act of 1891 (Act March 3, 1891, c. 551, sec. 11, 26 Stat. 1086 (U. S. Comp. St. 1901, p. 1299)), not in the Act of 1903. Inasmuch as he was not seized, even, for purposes of deportation, until more than a year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the Act of 1891 had fully expired.
>
> The prisoner is discharged."

In the opinion filed in this case by Judge Rudkin, wherein he sets forth the reasons which impelled him to dissent from the opinion of the Circuit Court of Appeals for the Fifth Circuit in Mayo v. U. S., supra, he in part adopts our reasoning wherein he holds:

> "But there is excepted from this general saving clause the cases mentioned in the third proviso to section 19, and that proviso is expressly made applicable to all classes of aliens, irrespective of the time of their entry into this

case of Lapina v. Williams, 232 U. S. 78; 34 Sup. Ct. Rep. 196, by the holding that the acts applied to aliens, whether returning to a previously acquired domicile or as immigrants. This decision was rendered Jan. 5th, 1914, and comments at length upon the earlier conflict of judicial opinions and the importance of the point. When we consider that this present act is mainly a recodification of the prior existing immigration legislation, it is all the more apparent that Congress would want to make it very plain that while the wording of the act may have been changed, there was to be no change as to whether the legislation applied to domiciled aliens or not and whether domicile could be asserted to defeat deportation. For this reason, we submit, this third proviso of Section 19 was inserted. How complete it is for the purpose is most obvious. Note the language—the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. Congress here gave protection the right of domicile when over three years, for the mild offenses; when over five years for the medium offenses, and no such protection, no matter how long the domicile, for the more serious offenses. When we take this view of the matter it is at once apparent why this proviso was inserted in the saving clause contained in Section 38. Congress did not intend that the more serious offenders, that is, the moral degenerates, the outcasts, the enemies of civilized peoples and organized governments, should

ever be heard to assert the right of domicile to defeat an effort to deport them out of the country. We assert that this, in our opinion, is exactly what Congress intended to and what it in fact did do.

This creates no hiatus in the enforcement of the law. On the contrary, it holds in force the law which has been violated for the express purpose of the prosecution, either criminal or civil, of all transgressions against it. Thus a person who has offended against the prior Immigration Act may be arrested and charged with such violation and made to answer thereto, the earlier act being held in force for that purpose. A person who has offended against the Chinese Exclusion Laws prior to the amendment thereof as contained in the last Immigration Law, may be arrested and charged with such violation as provided in the Chinese Exclusion Laws, which necessitates a *judicial* hearing all as held by the Supreme Court in the Woo Jan case. To deport under the present Immigration Law for a violation of a prior Immigration Law matters little to such a defendant, the procedure of deportation being the same under both the old and the new Immigration Laws, always provided, of course, that it is made clear to the defendant what law he is charged with having violated. This does not hold good, however, when the violation complained of is of the Chinese Exclusion Laws prior to May 1st, 1917, for as to such violation the judiciary, under those laws as then existing, has exclusive jurisdiction, if, indeed, it has not now in all such cases.

Another point to be made in connection with these cases is that the first two of them arose within the Fifth Circuit, where the decision of the appellate court of the circuit in Mayo v. U. S., supra, is supposed to be the prevailing law. The government accepted that decision. They did not ask either a rehearing or for *certiorari*. In spite of this we find the Immigration Department, even in cases which arose within that circuit, in effect ignoring the decision in a like case in which they were a party. The case was decided in the lower court July 24, 1917, which was prior to the issuance of any of the warrants of arrest in these cases. In attempting to override or ignore that decision they should be held to abide their election, and their jurisdiction failing, an order of absolute discharge should be made herein. That was even then the order on July 24, 1917. The decision of the Circuit Court of Appeals in Mayo v. U. S., supra, was rendered on April 12, 1918. Having invoked that appellate jurisdiction, and having accepted that decision without either asking a rehearing or *certiorari*, it is felt that in their practice within that district and circuit at least they should be guided by it.

The Court of Appeals in its decision herein holds that the last General Immigration Act, that of February 5, 1917, is retroactive in this that it permits of the trial and deportation by *executive process* of Chinese found in this country in violation of the Chinese Exclusion Acts, irrespective of whether

their entry had preceded the taking effect of the last General Immigration Act or not. This in its effect partially circumvents the decision of the Supreme Court in the Woo Jan case (245 U. S. 552) wherein it was held that Chinese persons could not be so deported, but if removed at all it should be by *judicial process.*

After the submission of this case to the Court of Appeals the Supreme Court had occasion to advert to the decision in the Woo Jan case in a way and manner which leads us towards the conclusion that this august tribunal does not regard that decision as having been so circumvented in the actual operation of the Chinese Exclusion Acts. The case referred to is that of White v. Chin Fong, 253 U. S. 90; 40 Sup. Ct. 449, decided on May 17, 1920. There is another thought that tends to confirm this view. The Woo Jan case was decided by the Supreme Court almost one year after the Immigration Act of February 5, 1917, was adopted. It is quite probable that this last mentioned act, being then prevailing law, was a present and operative factor in the mind of the court when, in concluding its decision in that case, it held:

> "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. They are addressed under treaty stipulations to laborers only. Other classes are not included in their limitation and it was provided by treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed differ-

> ent from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by Section 43."

In the recent case of White v. Chin Fong, supra, the Supreme Court speaks in this manner of the Woo Jan case:

> "In the case of United States v. Woo Jan, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who had been in the United States and has departed from it with the intention of returning is entitled under existing legislation to have his right to do so judicially investigated with 'its assurances and sanctions', as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action."

As affecting the present litigation we are confronted with the fact that Ng Fung Ho, a returning merchant with an investigated status as a merchant, would be entitled to a judicial determination of his right to re-enter, had that right been withheld. Can it by any parity of reasoning be held that his rights are any less because of his regular entry upon the order of the commissioner? Can he be deported by a less formal proceeding than he is entitled to in asserting his right of entry? We think not. Ng Yuen Shew was landed upon appeal by the secretary as his son. As to Gin Sang Get and Ging Sang

Mo, they are citizens, but their rights as such cannot be less than that of the alien merchant as has been held by the lower Court of Appeals in Tsoi Sim v. U. S., 116 Fed. 920, 925. All of these four appellants were regularly admitted into the United States by the appropriate immigration officials after due examination and determination of their respective rights of admission, and long after the consummation thereof. The action of the secretary is clearly against the explicit language of the Chinese Exclusion Law which requires a *judicial hearing and determination.* The conclusion of the decision in White v. Chin Fong, supra, is as follows:

> "The Government appeals against the explicit words of the provision of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or if they fraudulently enter, to expel them, and, it is insisted, that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention, it is urged, should not be ascribed to the laws, and in emphasis, it is said, 'such a legislative absurdity is unthinkable'. But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this court has declared, and in the present case the right that had been adjudged and had been exercised in reliance upon the adjudication."

SECOND.

The second point affects Gin Sang Get and Gin Sang Mo, brothers, who are the foreign-born sons

of a native-born citizen of the United States, and hence are themselves citizens of the United States. It is whether the statutory charge under the General Immigration Law that "He entered without inspection, by means of false and misleading statements" and the charge under the Chinese Exclusion Law with "being a Chinese laborer not in possession of a certificate of residence", which is separately made as to each of the brothers, are sufficiently supported by evidence and whether the charges as claimed fall within the respective statutes.

By referring to the warrants of deportation as to these brothers, we find that it is charged that the first, Gin Sang Get entered on the 24th of July, 1916, and the second, Gin Sang Mo, entered on April 28th, 1917. In each instance it is disclosed that the appellants arrived at a regularly designated port of entry for Chinese and immigration purposes upon regular passenger steamers, that they were duly taken to the immigration station and after a protracted examination of witnesses and examination of prior immigration records, and making of reports by the government's investigative officers, these boys were ordered admitted into the United States as citizens thereof by the Commissioner of Immigration for the Port of San Francisco, thereafter applying for and receiving their certificates of identity. Here was no entry without inspection. On the contrary, here was an entry after a most rigid and protracted examination made upon the order of the Commissioner of Immigra-

tion. But the Secretary states "by means of false and misleading statements", thus by a latitudinarian construction of the statute adding something to it which changes absolutely its meaning. Has the Secretary of Labor power to take the statutory ground of deportation "who enters without inspection" and add the qualifying and contradictory phrase "by means of false and misleading statements" and so completely change the charge as to make it a flat contradiction of the congressional will? The extraordinary power which Congress (Section 19, last Immigration Act) gave the Secretary was to reach the cases of

> "any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection."

These appellants have not violated these statutory provisions but on the contrary have complied with them. They entered at a duly designated port of entry, at a time and place where they were received, inspected and examined by the immigration officials, they were taken to the Angel Island Immigration Station and held and examined, their cases were reported upon, considered at length, and thereafter they were duly landed by order of the immigration officials. The records in each of their cases show this. The extraordinary power which

Congress gave the Secretary was to reach the cases of those who evaded inspection, examination and compliance with the order disposing of their cases. When this charge is established it means deportation, irrespective of the fact that the person might have been admissible into the United States, had he submitted his claims to the immigration officials and been content to abide their decision. Congress did not extend it to those who had complied with all of the forms and procedure exacted by the statute. Certainly this is an attempted amendment to the law, not an interpretation of it. To enter without inspection has a clear cut, well defined meaning which leaves no room for doubt in the mind of a person as to the issue he has to meet, which is what Congress intended it should be, simple and direct, with no chance of a misunderstanding. To enter without inspection, *by means of false and misleading statements,* is in itself a violent contradiction. Not only this, but it is manifestly vague and ambiguous, affording the person charged no adequate information of what he has to meet. It is without the authority of the statute and therefore lacks binding force and effect. It is not "within the authority of the statute" which is one of the essential prerequisites as held in Low Wah Suey v. Backus, 225 U. S. 460, by this honorable court, and further commented upon in Gegiow v. Uhl, 239 U. S. 31. In the case of Howe v. U. S. 247 Fed. 292, the same charge of entry without inspection, to which must have been added the qualification

here complained of, was involved, and there as here it was shown that the person had entered after inspection and a submission of his claims of admission to the immigration authorities, upon whose order he was admitted. The appellate court there said as to this charge:

> "There seems to us to be no ground whatever for saying that he entered in violation of law."

This entry without inspection charge was formerly considered by Judge Dooling in the case of Wong Tuey Hing, 213 Fed. 112, to which the attention of the court is most respectfully invited. The court said:

> "If he entered without inspection, as the warrant of deportation recites, it was because the immigration officials did not desire to inspect him, not because he prevented them from so doing",

and after calling attention to Rule 3 of the Chinese Regulations:

> "It is evident therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor. He complied with every requirement of the law to establish his status as a Chinese entitled to depart from and return to this country. If that status is to be inquired into again a year after his re-entry into the country, it should be inquired into under the exclusion laws and not under the immigration act."

In the case of General Castro (203 Fed. 155), reported as U. S. v. Williams, it is held:

> "Aliens have the right to enter the United States except so far as the right is restricted by our statutes. * * * The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected."

In Redfern v. Halpert, 186 Fed. 150, the appellate court for the Fifth Circuit held with approval:

> "The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed."

We submit that there is nothing to support the contention that these young men entered the United State in violation of that part of the Immigration Law which prohibits entry without inspection.

The contention of the government that they could so interpret the statute by regulation must fall to the ground. It is against all of the cases upon that point. Morril v. Jones, 106 U. S. 466, it is held:

> "In our opinion, the object of the secretary could only be accomplished by an amendment to the law. That is not the office of a treasury regulation."

See also U. S. v. George, 228 U. S. 14, where the court, through Mr. Justice McKenna, said:

> "If the Secretary of the Interior may add by regulation one condition, may he not add an-

> other? If he may require a witness or witnesses in addition to what section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department?"

In the case of U. S. v. United Verde Copper Co., 196 U. S. 207, the court, speaking again through Mr. Justice McKenna, said:

> "If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

We submit that vast powers are given the immigration officials in the legislation under consideration. Those powers are so almost unlimited in their scope that we are struck with wonder that any attempt should be made to enlarge upon them by indulging in such dubious construction. Certainly there must be a limit somewhere and the court is most respectfully called upon to define it. We feel that this alleged violation of the Immigration Law is nothing but a makeweight charge thrown in against these appellants in a vain endeavor to bring these cases within their executive jurisdiction, the department knowing before it had issued its warrants of deportation that the Circuit Court of Appeals for the Fifth Circuit had already held that the Secretary was without jurisdiction where the Chinese Exclusion Law alone was involved.

Turning our attention now to the case of these two boys upon the merits, we find that whether examined under the one law or the other that their claim of American citizenship should have been recognized. The additional safeguards of a judicial hearing with all the sanctity of its procedure and the impartiality of its hearing and ultimate judgment (as set forth in Woo Jan's case), would have given these appellants a more fair and adequate opportunity to present their defense. Even so and considering the limitations which the executive character of the hearing placed them under, we feel that their case of American citizenship was fully and fairly made out when they were applicants for admission into the United States, all as shown by the records in the admission cases of each thereof. After being duly admitted into the United States they had issued to them their respective Certificates of Identity, and this attempt of the immigration officials to now retry that issue and determine it adversely upon suspicion and conjecture should not be encouraged. There is a growing tendency in the decisions of the courts to hold these immigration decisions in favor of admission, and the Certificates of Identity issued under departmental regulation for the future protection of such formes applicants for admission, as entitled to the recognition of the courts as establishing a prima facie right of residence, in the absence of a satisfactory showing of error. See the case of Liu Hop Fong v U. S., 209 U. S. 453, where this court said "certainly

the certificate ought to be entitled to some weight". In the case of U. S. v. Hom Lim, 214 Fed. 456, at 463 the court said:

> "The decision of his right to enter was presumptively correct, and unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

In Ex parte Wong Yee Toon, 227 Fed. 247, at 251 the court said:

> "Such a certificate imports at least prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect."

And in the same case upon appeal to the Circuit Court of Appeals, Wong Yee Toon v. Stump, 233 Fed. 194, at 196 the court said:

> "After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted."

In the case of Lui Hip Chin v. Plummer, 238 Fed. 763, supra, the lower appellate court held:

> "But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

Attention is also directed to the recent case of Lum You, 262 Fed. 451, wherein Judge Dooling held as follows:

"The record shows that petitioner was admitted to this country in January, 1910, as the son of a native born citizen of this country. He was about 12 years old. In 1916 he returned to China without a preinvestigation of his status, because of the serious illness of his mother in China, whom he desired to see, did not afford him time for such preinvestigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father and because of other discrepancies in the testimony of the father given at different times in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.

The rights of one whose status as an American citizen has already been determined, who has lived a number of years in this country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case much of it having nothing at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside, but I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case."

Attention is also directed to the case of Chan Wy Sheung, 262 Fed. 221, wherein it is held:

"I am fully aware of the limited power of the court in matters of this kind and of the force and effect that must be given to the findings of the department, but I am of the opinion that the question here presented is one of law rather than of fact and I cannot sanction the injustice that would result from excluding the

> applicant from the country at this late day under the circumstances disclosed by this record. The decisions of the department after a full hearing should be given some effect and should not be overturned or set aside in subsequent cases upon any such pretext or for any such reasons as are here assigned."

This point is submitted upon the immigration record in the admission case and as supplemented by the record in the deportation proceeding. We feel that the burden of the government, under the Immigration Law and the decisions here quoted, of showing some real substantial evidence to support them in attempting, at this late date and in this disadvantageous kind and class of a hearing, to set aside the former finding of American citizenship of these two appellants by the appellee herein, has been a failure, no such evidence being disclosed. These two appellants were originally admitted into this country as citizens thereof by order of the appellee herein after a most protracted examination of many witnesses, inspection of records, reports of inspectors and so on. Their landing was proper. They were given certificates of identity as evidence of their lawful residence as citizens within this country. They have consistently maintained the lawfulness of their residence here and are within the protection of our constitutional guaranties, mentioned in General Castro's case (203 Fed. 155), and it is most respectfully submitted that they are entitled to be relieved of the restraint imposed by the warrant of the Secretary. See the recent case

of U. S. v. Low Hong, 261 Fed. 73, by the Circuit Court of Appeals for the Fifth Circuit wherein the determination of American citizenship was not held to be dependent upon the investigation and determination thereof by the Secretary.

In Moy Suey (147 Fed. 697) the appellate court for the Seventh Circuit held as follows:

> "But when a person, physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination in due process of law."

In Gee Cue Beng v. United States (184 Fed. 383) the Circuit Court of Appeals for the Fifth Circuit copies verbatim a large portion of the Moy Suey decision and adopts it as their own.

In Pang Sho Yin v. United States (154 Fed. 660) Circuit Court of Appeals for the Sixth Circuit, enunciate the same principles and conclude:

> "The identification of the appellant by the witness as the child of their acquaintance in San Francisco is so positive that we cannot feel

> justified in disregarding it when the consequences are so serious as the possible (and we think probable) expulsion from his native country of one who is entitled to share the birthright of citizenship."

With profit also might be perused a very able decision of District Judge Newman in United States v. Charlie Dart (251 Fed. 394), and the opinion of the same judge in United States v. Jhu Why, reported in 175 Fed. 630.

There is a still more recently decided case by this court, that of Kwock Jan Fat v. White, 253 U. S. 454; 40 Sup. Ct. 566, decided June 7, 1920. In that case, which was of a native-born American citizen of the Chinese race seeking readmission, the court held:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country",

and concluded as follows:

> "The practice indicated in Chin Yow v. United States, 208 U. S. 8, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits."

These two decisions comprise what might be termed *the last word,* from this Honorable Court upon the subjects involved. We feel that they cannot but have a beneficial effect upon the rights of these appellants and that they are a sufficient warrant for the according of a judicial hearing for the

final determination of the continued right of resi
dence of all four of these petitioners and the con
tinuation of the right of citizenship of the las
two of appellants.

THIRD.

This, the final point in the case, affects the firs
two of the appellants, Ng Fung Ho and his son
Ng Yuen Shew whether the hearing accorded them
was fair and whether the conclusion reached wa
sufficiently sustained by the evidence contained in
the record.

Ng Fung Ho was readmitted into the United
States as a Chinese merchant returning to hi
previously acquired domicile. He presented th
evidence required by the statute in such case
exacted and was readmitted. The evidence of th
then minority and the existence of the relationshi
of father and son between Ng Fung Ho and Ng
Yuen Shew was then and there established and i
still conceded to be correct. The status of the son
Ng Yuen Shew is held to be entirely dependent upon
the status of the father, Ng Fung Ho, his right o
continued residence standing or falling with his.

Upon this point these appellants are alien Chinese
entitled under the Chinese Exclusion Law to a judi
cial hearing to test the legality of their continued
right of residence. They entered this country almos
two years before the present General Immigration
Act became effective. The son was landed by orde

of the Secretary of Labor, and in reaching that order the lawfulness of the domicile of the father was recognized. For the period of almost two years after their admission, had their right of residence been assailed, it could only have been done by a judicial proceeding. That was a valuable right attached to their right of residence in this country (Woo Jan's case, supra). To attempt to now deport them without such judicial hearing is to deprive them of a fair opportunity to safeguard their right of residence in this country. They presented the evidence exacted by the statute, by the kind of witnesses exacted therein, and it was determined by the officials whose duty it was to pass upon the facts, and they were and are therefore entitled to residence in this country. Chin Fong v. White, 258 Fed. 849; White v. Chin Fong, 253 U. S. 90; 40 Sup. Ct. 449, supra. They were issued Certificates of Identity and, under the line of authorities set forth in the two preceding points, these were not to be ignored. They were presumptively correctly admitted. We feel that full justice to these two appellants may only be accorded them by a judicial hearing.

These cases are finally submitted as to each of the three points involved. Attention is again called to the statement thereof. If the first point is sustained in favor of appellants, there would still remain the second point as solely affecting the alleged specific violation of the General Immigration Law. Should the first point be decided adversely to the appellants,

there would yet remain the second and third points, the sustaining of any of which would mean the release of the appellant or appellants whose rights are therein affected, irrespective of the adverse finding upon the jurisdictional feature involved in the first point. We feel that any final judgment in favor of any or all of the appellants should be that of an absolute discharge.

Dated, San Francisco,
December 7, 1921.

Respectfully submitted,

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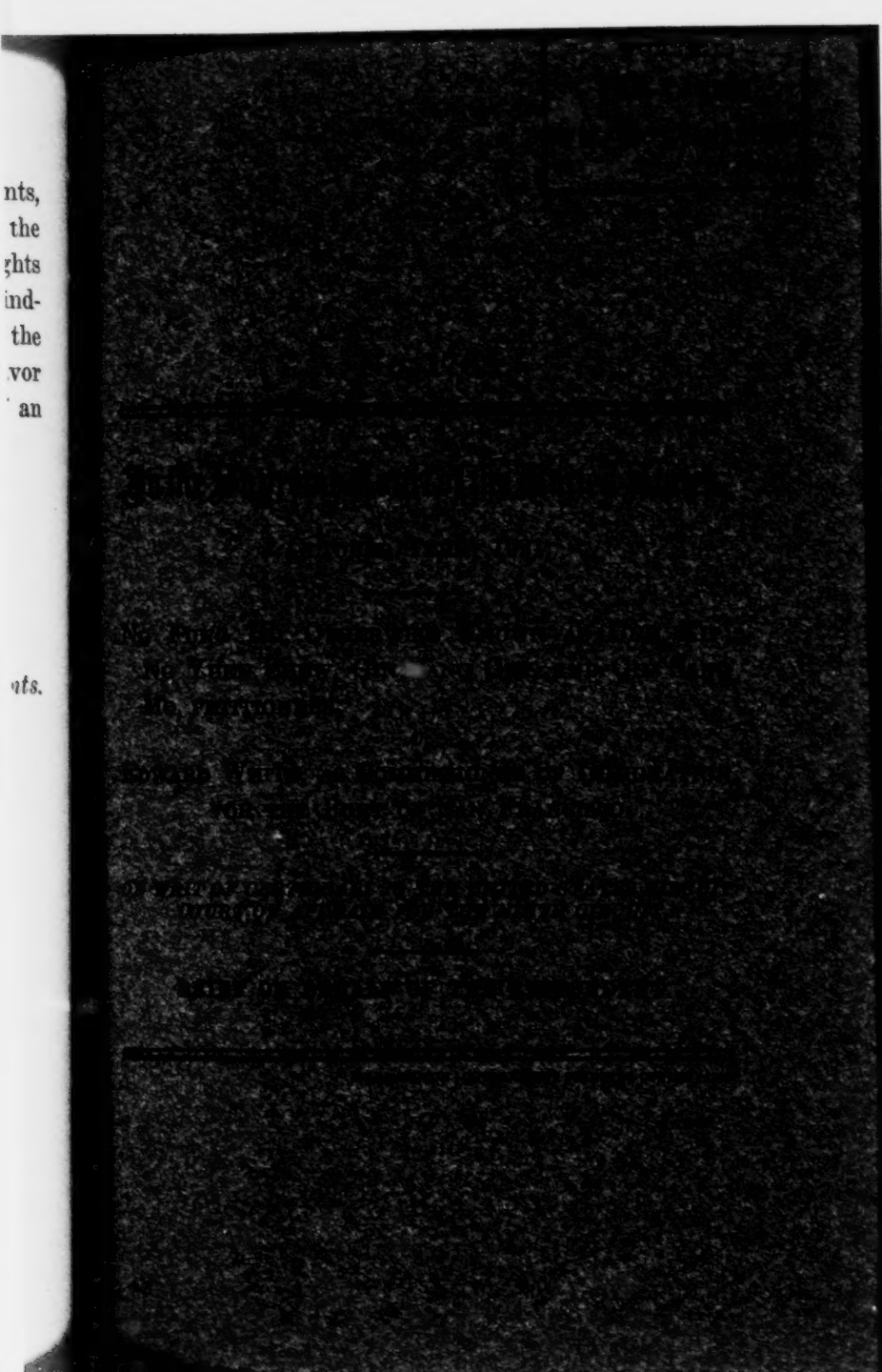

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

NG FUNG HO, OTHERWISE KNOWN AS Ung Kip; Ng Yuen Shew, Gin Sang Get, and Gin Sang Mo, petitioners,
v.
EDWARD WHITE, AS COMMISSIONER OF Immigration for the Port of San Francisco.
} No. 176.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE RESPONDENT.

I.

Assuming that the procedure prescribed by the general immigration act of February 5, 1917, c. 29, may be applied in any case involving the expulsion of Chinese persons already in this country, it is not necessary to give it a retroactive effect in order to sustain the deportations in the cases at bar, since the ground of said deportations was not the unlawful entries of the appellants, but their unlawful remaining.

(*a*) It is respectfully submitted that the case at bar was decided by the two lower courts, and is argued in the brief in this court on behalf of appellants

on an entirely wrong theory—that is, a theory not arising on the facts of the case as stated in the record, viz, that, in order to maintain the validity of the arrest and deportation of appellants, it is necessary to give a retroactive effect to section 19 of the general immigration act of February 5, 1917, c. 29, 39, Stat. 889, because the said arrest and deportation of appellants were for an unlawful entry into this country, which entry admittedly took place, in the case of all the appellants, prior to May 1, 1917, the effective date of the act of February 5, 1917, c. 29. This theory of the case, however, quite overlooks the fact that the warrants of arrest and deportation in the cases of appellants were not based at all on an unlawful entry. The warrants of deportation are set out in the petition for the writ of habeas corpus (R. 2–13), and, as they are all alike as respects the ground of deportation, that of Ng Fung Ho (R. 4, 5) will be taken as the type. The charge against Ho, on which the right to arrest and deport him was solely based, was "that *he has been found* within the United States in violation of section 6, Chinese exclusion act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

The warrant of arrest in Ho's case was dated September 20, 1917; in Shew's case on the same date; in Get and in Mo's cases on November 12, 1917.

(*b*) It thus appears from the record that the right to deport appellants was asserted, not on account of

something done by them prior to the going into effect of the act of February 5, 1917, c. 29, viz., an unlawful entry prior to May 1, 1917, but on account of their having been found in this country after May 1, 1917, in violation of a special act of May 5, 1892, c. 60, which dealt only with the act of unlawfully remaining in this country irrespective of the lawfulness or unlawfulness of the original entry.

(*c*) There can not be any doubt that the unlawful entry of an alien into the United States, and the unlawful remaining of such alien after entry, are, both in their nature and by explicit statutory provisions, entirely distinct. An alien may enter this country unlawfully and yet be entitled to remain, as where, by treaty or act of Congress ratified or approved subsequent to his entry, the class to which he belongs is withdrawn from the excluded classes. Conversely, an alien may enter the United States lawfully and yet be subject subsequently to deportation, owing to a change in the law, and this is the very case (as will be shown later) with the act of May 5, 1892, c. 60, on which the deportation proceedings in the case at bar were based. This distinction between an unlawful entry and an unlawful remaining, founded in the nature of things, has been adopted by the Chinese exclusion acts practically from the beginning. For example, section 1 of the act of May 6, 1882, c. 126, 22 Stat. 58, provided that the coming of Chinese laborers to the United States should be suspended and that during such suspension it should not be lawful for any Chinese laborer

to come to this country, or, "*having so come, to remain within the United States,*" thus in the most distinct language providing not merely for the unlawful entry of Chinese laborers, but also for their unlawful remaining. It is true that, in so far as respects section 1 of the act of May 6, 1882, c. 126 (although not as respects section 6 of the act of May 5, 1892, c. 160, on which the present proceedings were based), the two offenses are connected, so that there could not be an unlawful remaining unless there had been an unlawful entry. Nevertheless the two grounds, one of exclusion and the other of expulsion, are distinct things and are distinguished throughout the act. For example, section 6 of the act provided for certificates of identity as the badge of the non-excluded classes. Section 12 (after dealing with an unlawful entry) provided that "any Chinese person *found unlawfully* within the United States" should be caused to be deported. How would it be determined whether a Chinese person was "found unlawfully within the United States" or not? In so far as the Chinese person was concerned, solely by the production of the certificate of identity which, by the provisions of section 6, must be, *at any time after entry*, "produced to the proper authorities of the United States whenever lawfully demanded." While, therefore, the unlawful remaining is, under the act of May 6, 1882, c. 126, dependent on the unlawful entry, yet it is a distinct ground for deportation, with clearly separated procedural provisions.

(*d*) When the special act of May 5, 1892, c. 60, 27 Stat. 25 (on which the deportation proceedings in the present case were based), is examined, it will be perceived that the material portions of this act do not deal with the entry of Chinese persons at all, but only with their being or remaining in the United States. This statute was carefully analyzed and its constitutionality sustained in *Fang Yue Ting* v. *United States* 149 U. S. 698. It was said in the opinion in that case that the act "deals with two classes of Chinese persons, first, those 'not lawfully entitled to be or remain in the United States,' and second, those 'entitled to remain in the United States.' These words of description neither confer nor take away any right, but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of the act, but subject, nevertheless, to the power of the United States, absolutely or conditionally, to withdraw the permission and to terminate the authority to remain." The court then went on to point out that the said act of May 5, 1892 c. 60, took the class of Chinese laborers who were entitled to remain in the United States and, by section 6 (the relevant section to the case at bar), imposed upon it the condition of the procurement from the proper officials of a certificate of residence without which the members of said class ceased to be lawfully, and became unlawfully, within the United States, and subject to deportation on that ground. One of the Chinese persons before this court

in the Fang Yue Ting case had come to this country in 1879 and had ever since resided here (149 U. S. 702(, so that he had entered this country lawfully and was, up to the passage of the act of May 5, 1892 c. 60, entitled to remain here. Yet an order of deportation against him was sustained (149 U. S. 731), because he did not have the certificate of residence prescribed by the act. In its opinion, the court made the following statements:

> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.
>
> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. * * *
>
> * * * it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen or otherwise, to be and remain in this country, except by the license, permission, and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it. * * *
>
> Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the Government of

the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps toward becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

For the reasons stated in the earlier part of this opinion, Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this.

The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States, that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or

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> punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of Congress, can have a material bearing upon the question whether he shall be sent out of the country or be permitted to remain.

Mr. Justice Field, who was thoroughly familiar with the Chinese exclusion laws, dissented on the express ground that the power to expel after entry was so different from the power to exclude as to require the application of different principles, but this court, while admitting that exclusion and expulsion were two distinct things, denied that different principles of constitutional law applied to them. The same answer was made to the same claim in *Wong Wing* v. *United States* 163 U. S. 228, 231; and in *Li Sing* v. *United States* 180 U. S. 486, 488, 490, it was held that a favorable ruling by the proper authority as to the right of a Chinese person to enter this country was not *res adjudicata* as to his right to remain. In *Ah How* v. *United States* 193 U. S. 65, 77, the case of Fong Yue Ting was followed, and the ground of deportation was recognized as unlawful remaining, not unlawful entry. In the case of *White* v. *Chin Fang* 253 U. S. 90, 92, the court said:

> In the case of *United States* v. *Woo Jan* 245 U. S. we had occasion to consider the difference between the situation of a Chinese person in the United States and one seeking

to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to Executive action and decision.

In these very recent cases, therefore, as in prior cases, the court recognized the distinction, as a ground for deportation of an alien, between unlawful entry and unlawful remaining even where the latter was dependent on the former.

(*e*) When analyzed, the distinction between an unlawful entry and an unlawful remaining is found to be the distinction between an act and a state, between a thing done once for all, and a relationship extending over a period of time, as in the case of committing, as distinguished from maintaining, a nuisance. Thus a man deserts from the military service once for all, but the state of desertion may continue for some time. Alienage itself is a status to which qualifying characteristics may be added which limit the class; as by occurrence of war the alien may become an enemy which status of alien enemy will continue until e. g. peace. So an alien may have the additional status of Chinese laborer, and to this is added, by the act of May 5, 1892 c. 60, the possession of a certificate of residence so that the law now recognizes the status of an alien Chinese laborer without (or with) a certificate of residence. This status continues until it is removed by some legal method as e. g. procurement of a certificate. So long as it continues it is ground for removal, and, if it be in existence at the time of the arrest and de-

portation, it furnishes a present, not a past, basis for the proceedings, and the act which authorizes deportation on account of this continuing status operates necessarily pro and not retroactively. In brief, while an unlawful entry is attempted or accomplished once for all, an unlawful remaining is a continuing state of affairs which may form a legal basis for deportation proceedings at any time it is found to exist.

(*f*) In *Bugajewitz* v. *United States* 228 U. S. 585, the alien was ordered deported because she had been found, after entry, practicing prostitution and an inmate of a house of prostitution in violation of the act of February 20, 1907 c. 1134, as amended by the act of March 26, 1910 c. 128. On the record it had to be taken that she was not a prostitute at the time of her entry (not later than January 4, 1905). It was claimed, therefore, that to apply the act of February 20, 1907 c. 1134, as amended, to her, and to deprive her of the three-year limitation contained in the unamended act was to give the legislation a retroactive effect. This claim the court denied saying:

> With regard to the petitioner it is not necessary to construe the statute as having any retrospective effect.

That is, the unlawful entry (if any) was distinct from the unlawful remaining in the country; the act of February 20, 1907 c. 1134, as amended, applied only to the latter, and, since admittedly the petitioner had been found practicing prostitution subsequent to the act of March 26, 1910 c. 128, the act operated prospectively upon her irrespective

of the time or character of her entry. So in the cases at bar, the charge against the appellants was that they had been unlawfully found in the United States after May 1, 1917, so that no question of the character or time of their entry arose, and to apply the general immigration act of February 5, 1917 c. 29, to them is not to make a retrospective application of that act. *Bugajewitz* v. *United States, supra,* seems to be decisive to this affect.

II.

Assuming that it is not necessary, in order to sustain the deportation proceedings in the cases at bar, to give a retroactive effect to the general immigration act of February 5, 1917 c. 29, the executive procedure prescribed by section 19 of that act, applies to the deportation of Chinese laborers found in this country in violation of the Chinese exclusion laws.

(*a*) Under the general immigration act of February 20, 1907 c. 1134, there had been, prior to the decision of this court on January 28, 1918, in *United States* v. *Woo Jan* 245 U. S. 552, a difference of opinion in the Federal courts as to whether the executive procedure prescribed by section 21 of that act applied to the deportation of Chinese laborers found in this country in violation of the Chinese exclusion laws, certain of the decisions pro and con being noticed by this court in the Woo Jan case (245 U. S. 553); and a comparison of dates shows, of course, that this difference of opinion existed at the time of the passage of the general immigration act of February 5,

1917 c. 29. It was the intention of this latter act to terminate this difference of opinion and to make quite clear the intention of Congress to apply the executive procedure to such cases. The Senate report upon the Act (S. Rept. No. 352, 64th Cong., 1st sess.) contained the following statement as to the purpose of the Act:

> Its object is to make perfectly clear the intent to continue the practice established when the act of 1907 was passed of expelling from the United States every alien who, after having secured admission in one way or another, was found here within the period of limitation fixed and was found to have been at the time of his entry a member of any one of the list of classes enumerated in section 2 of the said act, corresponding to section 3 of this act; *and also the intent to continue the practice established under that act, and since approved in a number of court decisions, * * * of expelling aliens who enter or are found here in violation of the Chinese exclusion law, adapting the administrative process of the immigration act to that class of cases wherever the proceedings are instituted within the period of limitation specified therein.* (Italics ours.)

This object the act effected by, first, providing in section 19 for the arrest and deportation by warrant of the Secretary of Labor of "any alien who * * * shall be found in the United States in violation of this act, *or in violation of any other law of the United States;*" and, second, by providing in section 38

that "this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, *except as provided in section 19 hereof.*" Since section 19 by its inclusion of "violations of any other law of the United States" clearly included violations of the Chinese exclusion laws, and since, by force of the exception in section 38, the Chinese exclusion laws were amended to the extent required by the provision in section 19, it follows necessarily that the executive procedure of deportation prescribed by section 19 applies to Chinese laborers found in this country in violation of the Chinese exclusion laws, and specifically of the act of May 5, 1892, c. 60.

(*b*) The reasoning of this court in *United States* v. *Woo Jan* 245 U. S. 552, where a different construction was given to the immigration act of February 20, 1907 c. 1134, is not applicable to the immigration act of February 5, 1917 c. 29. In the Woo Jan case it was admitted that the provision in section 21 of the act of February 20, 1907 c. 1134, extending the executive procedure to violations of any law of the United States was a strong indication that Congress intended to extend such procedure to violations of the Chinese exclusion laws 245 U. S. 555, but it was held that the unqualified provision of section 43 that the act of February 20, 1907 c. 1134, should not be taken to amend, alter, or repeal the Chinese exclusion laws, being a special, direct provision, overrode the prior general pro-

vision. In the act of February 5, 1917 c. 29, how ever, the language has been changed, and an expre provision made that the Chinese exclusion laws sha be amended in so far as the procedure for deportatio is concerned. In other words, Congress anticipate the decision of this court in the Woo Jan case, an resolved the inconsistency there noted.

There can be no doubt, therefore, that the pro visions of section 19 of the immigration act of Feb ruary 5, 1917 c. 29, apply to the deportation Chinese laborers found in this country in violation the act of May 5, 1892 c. 60.

III.

Assuming that the deportation proceedings were base on acts done by appellants prior to May 1, 1917, vi their entry on July 20, 1915, July 24, 1916, and Apr 28, 1917, respectively, they were nevertheless vali since section 19 of the act of February 5, 1917 (c. 29 operated retroactively to cover acts done prior to it going into effect, provided, at any rate, that the de portation proceedings were begun (as they were i the cases at bar) within 5 years of the original entry

(*a*) What has been said under the two prior head ings is sufficient to show that the deportation pro ceedings in the cases at bar were in accordance wit law. Lest, however, it should be claimed that th Government admits the impossibility of giving a re troactive effect to section 19 of the act of Februar 5, 1917 c. 29, the reasons will be briefly stated whic induce the belief that the decisions of the court below were right, assuming they could be supporte

only on the grounds stated therein. These reasons are three:

First. Section 19, at its very outset, clearly shows its retroactive character. Whereas section 20 of the act of February 20, 1907, c. 1134, provided that "any alien who *shall enter* the United States * * * shall be deported," section 19 of the act of February 5, 1917, c. 29, provided that "any alien who *shall have entered*, or who shall be found, in the United States * * * shall be deported." The Senate report (referred to above) specifically noted this change of language and said of section 19:

> With certain exceptions the provisions of the section are made retroactive.

Second. Section 38 of the act of February 5, 1917, c. 29, provided as follows:

> That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings, brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, *except as mentioned in the third proviso of section nineteen hereof:* * * *

Herein lies the key to the construction of section 19 as to its retroactivity. The language italicized in the excerpt quoted above cannot be given any effect whatsoever unless some portion of the third proviso of section 19 be construed as so to affect some act, thing, or matter done or existing at the time of the taking effect of the act of February 5, 1917, c. 29. In other words, the third proviso of section 19 must be given a

retroactive effect in some way, for some purpose, to some extent, or the exception in section 38 must be stricken from the act.

Third. Section 19 of the act of February 5, 1917, c. 29, begins by specifying in considerable detail the classes of aliens who may be deported on warrant of the Secretary of Labor. The third proviso, to which the exception in section 38 refers, reads:

> That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned *irrespective of the time of their entry into the United States.*

The first question is as to the meaning of the words "time of their entry into the United States." It is evident that this "time of entry" may be taken as relative to the time when the act of February 5, 1917, c. 29, took effect, or as relative to the time when deportation proceedings are instituted. If the words be given the former meaning, the section is given a retroactive effect, if the latter, it is not. We have seen, however, that the exception in section 38 requires a retroactive construction to the third proviso in section 19. Therefore, to carry out the obligation imposed by the exception to section 38, the words "time of entry" in the third proviso to section 19 must be construed as relative to the time when the act of February 5, 1917, c. 29, went into effect, that is, May 1, 1917; and the third proviso must be read as enacting that the deportation provisions of the section apply to the classes of aliens specified in the section,

whether their entry occurred prior to the going into effect of the act or not. This conclusion seems to follow inevitably, if the exception in section 38 be given due effect in connection with the language in the third proviso to section 19.

(*b*) The only remaining question is whether the class of aliens involved in the cases at bar (under the concession made by the Government for the purposes of this part of the argument only), viz, aliens "who shall have entered * * * the United States * * * in violation of any other law of the United States," is among those whose time of entry relative to the time of going into effect of the act is immaterial; or whether it is included in "the exceptions hereinbefore noted" made by the third proviso to section 19 to the general retroactivity of that section. Clearly there is no express exception attached to the class at its place in the section. On the contrary, the words "who *shall have* entered" (as was pointed out above) positively place the class within the enacting portion of the third proviso. Moreover, two classes of aliens are mentioned in section 19 as to whom specific prospective provisions are made, viz, any alien "who is *hereafter* sentenced" for the first time for a crime committed within five years after entry, and any alien "who is *hereafter* sentenced" more than once for a crime committed at any time after entry. Here are two classes where an exception to the retroactive effect of section 19 is "hereinbefore noted," and these classes, therefore, are the classes referred to in the third proviso to section 19 as

excepted from the general provision making
section retroactive. In addition, of course, the
is not retroactive as to that class of aliens ente
or found in violation of the act itself. Apart f
these two express and one implied cases, section
is retroactive as to entry in all cases, including
case of those persons who shall have entered
violation of the Chinese exclusion laws.

The above argument has, of course, no bearing
the meaning of the words at the beginning of sec
19, "at any time within five years after entry."
may be admitted, for the purposes of the cases
bar, that these words qualify the right to instit
deportation proceedings against the class of ali
mentioned second after the beginning of section
(although not directly attached to that class),
aliens who shall have entered this country in vi
tion of the Chinese exclusion laws. The proceedi
against the appellants *were* begun within five ye
after their entry. The point, however, made in
argument above is that the words "time of entry"
the third proviso to section 19 refer to the "time
entry" relative to the time of the going into effect
the act, not the time of instituting deportation p
ceedings, because section 38 of the act of necess
gives them this meaning. The words "time of entr
at the beginning of section 19, however, just as clea
by specific provision relate to the time of institut
the deportation proceedings. The one thing
nothing to do with the other. The third proviso
section 19 must be construed with reference to

exception in section 38, and without reference to the provision contained at the beginning of section 19 as to the institution of deportation proceedings within a certain time after entry, which latter provision must be allowed its own independent operation, after the application of the retroactive provision of the third proviso.

IV.

The appellants were given a fair hearing and there was evidence to sustain the findings of the immigration officials.

Ng Fung Ho, alias Ung Kip, and Ng Yuen Shew were both arrested on warrants issued by the Assistant Secretary of Labor dated September 20, 1917, wherein it is charged that they have been found in the United States in violation of the Chinese exclusion law and setting forth wherein they are subject to deportation. (Ex. C, pp. 27 and 28.)

Both were arraigned under said warrants October 16, 1917, and were permitted to inspect the warrant of arrest and all the evidence on which said warrants were issued, and the aliens notified of their right to be represented by counsel. (Ex. C, pp. 59 and 55.) Said hearings were continued until October 30, 1917, at which time aliens were represented by counsel, who was allowed to inspect the warrants of arrest and all the testimony and evidence forming the immigration record. Counsel was further advised of his right to have witnesses subpœnaed if he so desired, which right was waived. (Ex. C, pp. 58 and 54.) A brief was filed by counsel (Ex. C, p. 67) and the record for-

warded to the department, together with the report of the inspector conducting the hearings under said warrants (Ex. C, pp. 51–46), for the action of the Secretary of Labor.

After a careful review and consideration of the evidence the Assistant Secretary, whose memorandum forms a part of the immigration record (Ex. C, pp. 76–73), ordered the aliens deported and warrants of deportation were issued accordingly (Ex. C, pp. 78 and 79).

The evidence in this case plainly shows that Ng Fung Ho, alias Ung Kip, at the time of his departure for China was not a merchant within the meaning of the Chinese exclusion law, not having been engaged in buying and selling merchandise at a fixed place of business for the space of one year immediately preceding the date of his departure from the United States. On the contrary, the record clearly shows that he was a laborer engaged in the restaurant business in Texas, and had been so for many years prior to his departure for China, and immediately upon his return he again engaged in the same occupation. His reentry into the United States was accomplished by fraud and being a laborer he could not reenter as such, not having a laborer's return certificate required by law. His son, Ng Yuen Shew, whose right to enter depended upon the mercantile status of his alleged father, was also inadmissible and was also admitted by reason of the fraud perpetrated on his behalf by his alleged father.

Gin Sang Get and Gin Sang Mo were arrested on warrants issued by the Assistant Secretary of Labor, dated November 12, 1917, charging that they had been found in the United States in violation of the Chinese exclusion law, and further, that they entered without inspection by means of false and misleading statements. (Ex. A, pp. 2 and 3.)

Both were arraigned and partial hearings had on said warrants November 23, 1917, at which time they were represented by counsel. (Ex. A, pp. 66 and 63.) At the request of counsel the hearings were continued from time to time in an effort to locate the alleged father and obtain his testimony but without success. The hearings were finally concluded January 16, 1918 (Ex. A, pp. 61–53), and the immigration records, together with the inspector's report and findings (Ex. A, pp. 111–109), were forwarded to the department at Washington, D. C., counsel for appellants filing no brief, but submitting the case on the record.

The Assistant Secretary of Labor, after a careful review and consideration of all the evidence as appears from his memorandum, ordered the aliens' deportation (Ex. A, pp. 116–114), and warrants of deportation were issued accordingly (Ex. A, pp. 118 and 119).

It thus appears that the appellants were accorded every opportunity of presenting any and all evidence in support of their right to be and remain in the United States; that they were represented by counsel, and that none of the rights to which they were en-

titled under the law or the rules and regulations of the Department of Labor was denied them. The evidence against them seems to have received the careful scrutiny of the Court of Appeals (R. 56–60), which decided that it was sufficient under the rule applicable to such proceedings.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

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